

The Film Consortium, Inc. and National Association of Broadcast Employees and Technicians, AFL-CIO, CLC, Local 531 and International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Party to the Contract. Case 31-CA-9564

22 December 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 24 May 1982 Administrative Law Judge Maurice M. Miller issued the attached decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in answer to the Respondent's exceptions. On 1 October 1982 the Board issued a Notice to Show Cause requesting the parties to state why, in light of the Board's decision in *Bruckner Nursing Home*,¹ the allegations of the complaint herein should not be dismissed. Thereafter, counsel for the General Counsel, the Charging Party, and the Respondent filed responses to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and the responses to the Notice to Show Cause and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent violated Section 8(a)(2) of the Act by its conduct in recognizing International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (IATSE) and thereafter by entering into a collective-bargaining agreement with that Union.² In reaching his conclusions, the judge followed two separate analyses. The first derived from the then-existing case law application of the *Midwest Piping*³ doctrine. The violation under this analysis was based on findings that the Respondent had through its conduct "conceded the substantiality" of a representation claim by National Association of Broadcast Employees and Technicians, AFL-CIO, CLC, Local 531 (NABET), prior to the Respondent's recognition of IATSE. Therefore, the judge found that, as of the

time of IATSE's recognition, a real question concerning representation existed among the Respondent's employees which triggered the Respondent's duty to remain neutral in the face of NABET's and IATSE's rival claims. The second analysis derived from the decision in *Lyndale Mfg. Corp.*, 238 NLRB 1281 (1978). The violation under this second analysis was predicated on the finding that the Respondent had, by its conduct, misled NABET and "lulled [NABET] into inaction" in NABET's effort to gain recognition as the representative of the Respondent's employees. In its exceptions, the Respondent argues that the facts presented support neither the *Midwest Piping* nor the *Lyndale* analysis, and the Respondent also argues that the *Midwest Piping* doctrine should be overruled. We agree with the Respondent that its conduct is not violative of the Act, but we do so only for the reasons set forth below.

Since the issuance of the judge's decision, we have reevaluated the application of the *Midwest Piping* doctrine in situations such as the one presented here—initial organizing situations involving two rival labor organizations. In *Bruckner Nursing Home*, supra, it was reestablished that the filing of a valid petition is "the operative event for the imposition of strict employer neutrality in rival union initial organizing situations." Accordingly, we held in that case that we would "no longer find 8(a)(2) violations in rival union, initial organizing situations where an employer recognizes a labor organization which represents an uncoerced, unassisted majority, before a valid petition for an election has been filed with the Board." In this case, while NABET sought to be recognized by the Respondent as the collective-bargaining representative of the Respondent's employees, it did not file a petition for an election among such employees at any time before the Respondent's recognition of IATSE. Thus, we find that an essential element of an 8(a)(2) violation under the *Bruckner* decision is not present here.⁴

¹ 262 NLRB 955 (1982).

² The judge also found a derivative 8(a)(3) violation based on the existence of a union-security clause in the collective-bargaining agreement between the Respondent and IATSE.

³ *Midwest Piping Co.*, 63 NLRB 1060 (1945).

⁴ Counsel for the General Counsel and the Charging Party both argue that the Respondent is not relieved of liability under the *Bruckner* analysis because the evidence does not demonstrate IATSE's majority status at the time of IATSE's recognition. This argument misconstrues the nature of an 8(a)(2) violation under the reevaluated *Midwest Piping* doctrine and erroneously seeks to impose upon the Respondent the burden of disproving an unestablished violation. Under the *Midwest Piping* doctrine, lack of majority status is not a necessary element of proof of the violation, and proof that the recognized union possesses majority support is not a defense to the alleged violation. See, e.g., *Bruckner*, supra. Recognition of a union that does not possess majority status is a separate theory of violation under Sec. 8(a)(2) and it is well established that it is the General Counsel's burden to prove the absence of majority status to support such theory. *Walker's Midstream Fuel & Service Co.*, 208 NLRB 158 (1974); *American Beef Packers*, 187 NLRB 996 (1971). In this case, inasmuch as IATSE's majority status was not placed in issue since the General Counsel neither alleged nor sought to prove that IATSE lacked majority status at the time of recognition, the Respondent was not required to demonstrate IATSE's actual majority status.

Further, we find, contrary to the judge, that the facts of this case do not support an 8(a)(2) violation under the *Lyndale* rationale. *Lyndale* also involved a rival union initial organizing situation. In that case, the respondent deflected a union's demand for recognition, accompanied by an offer to prove majority status through a card check, by asserting that it was not at full production and that "any further action would appear to be very premature." Approximately a month later, however, the respondent recognized another union on the basis of a card check and entered into a collective-bargaining agreement with that union, despite the fact that the employee complement had not appreciably increased and was still about one-third the level of its ultimate size. In finding that the respondent therein accorded preferential treatment and material assistance to the second union in violation of Section 8(a)(2), we pointed to the pretextual and misleading representations made by the respondent to the first union, which representations were found to have induced inactivity on the part of the first union and aided in the removal of an interested rival union from consideration. We also pointed to the respondent's failure to notify the first union of its intention to determine the representation question by affording the other union a card check.

Here, it was not shown that the Respondent made statements or otherwise led NABET to believe that circumstances existed to preclude representative status at the time when NABET first requested recognition. Nor do we view the Respondent's course of conduct—in indicating that it would attend multiemployer bargaining negotiations as an observer; in attending one such bargaining session as an observer; in requesting, for business purposes, a letter from NABET stating that it was a "union firm"; and in failing to question NABET's majority status when NABET requested it to sign a newly negotiated multiemployer contract—as sufficient basis for finding that the Respondent affirmatively and pretextually misled NABET. While NABET may have chosen to interpret the Respondent's conduct as indicating the possibility of recognition, the facts, as found by the judge, show that the Respondent at no time agreed to recognize or recognized NABET. Further, the evidence does not establish that NABET and IATSE presented the Respondent with the same set of circumstances in response to which the Respondent rejected the claims of one Union and accepted those of the other. NABET was not conclusively shown to have offered to prove its majority status or to have presented the Respondent with evidence of its support. Moreover, several weeks prior to IATSE's recognition, the Respondent notified NABET of

IATSE's rival claim and advised NABET that it would consider recognizing IATSE if IATSE could verify its majority status.⁵

In sum, we find that the evidence does not show 8(a)(2) assistance or interference under a *Midwest Piping* theory, as alleged, or under the rationale of *Lyndale*, as found by the judge, and we shall, accordingly, dismiss the complaint in its entirety.⁶

ORDER

The complaint is dismissed.

⁵ Chairman Dotson and Member Hunter agree that the instant case is factually distinguishable from *Lyndale Mfg. Corp.*, supra. However, their agreement in this regard should not be understood as necessarily indicating agreement with the ultimate holding of the Board in *Lyndale* itself.

⁶ In the absence of an 8(a)(2) violation, there is no longer any basis for the alleged 8(a)(3) violation.

DECISION

STATEMENT OF THE CASE

MAURICE M. MILLER, Administrative Law Judge: This case was submitted, upon a stipulated record, following a hearing held in Los Angeles, California, on December 10, 1981. Upon a charge and amended charge, filed on November 16 and December 20, 1979, respectively, by the National Association of Broadcast Employees and Technicians, AFL-CIO, CLC, Local 531, designated as Complainant Union herein, the General Counsel of the National Labor Relations Board, through the Regional Director for Region 31 of the Board, had caused a complaint and notice of hearing dated January 23, 1980, to be issued and served on The Film Consortium, Inc., designated as Respondent herein. Respondent was charged therein with the commission of unfair labor practices within the meaning of Section 8(a)(1), (2), and (3) of the National Labor Relations Act, as amended. 61 Stat. 136, 73 Stat. 519, 88 Stat. 395. Specifically, the General Counsel had charged that Respondent had become privy to a collective-bargaining agreement with International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, designated as IATSE herein, despite prior knowledge that Complainant Union (NABET) was then actively seeking to represent Respondent's employees covered by the agreement noted, which, inter alia, contained a union-shop provision requiring such employees to become IATSE members. Respondent's answer, duly filed, had conceded certain factual allegations within the General Counsel's complaint, but had denied the commission of unfair labor practices.

Pursuant to notice, a hearing with respect to this matter was convened before Administrative Law Judge David P. McDonald on June 10, 1980; the General Counsel, Respondent, Complainant Union, and IATSE were represented by counsel. The parties then entered into a "Stipulation of Facts" for submission directly to the Board. The Administrative Law Judge subsequently

filed his order transferring the matter to the Board for disposition, consistent with the stipulation of the parties.

On May 27, 1981, however, the Board remanded this matter to the Regional Director; subsequently, the matter was reset for further hearing on December 10, 1981, as previously noted.

At the hearing, convened pursuant to notice, the General Counsel and Respondent were represented by counsel; Complainant Union was represented by its business manager. Consistent with their requests, conveyed through the General Counsel's representative, counsel for Complainant Union and IATSE, who had previously noted appearances but who were not present when the hearing reconvened, were recognized as counsel of record so that they could file briefs should they consider such filings required. All parties were afforded a full opportunity to participate, and to introduce evidence with respect to pertinent matters. The parties thereupon presented the same stipulation of facts which they had previously proffered; all references to a proposed submission of the stipulation directly to the Board for decision were, however, deleted. The General Counsel's representative declared, with the concurrence of all parties, that the record thus constituted was considered sufficient to permit a Board determination with respect to the questions presented, and that nothing further would be submitted. The General Counsel then presented oral argument. Since the hearing's close, Respondent's counsel and Complainant Union's counsel have submitted briefs; these briefs have been duly considered.

Upon the record herein, which compasses a stipulation of facts supplemented by various relevant documents, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is now, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of California with an office and principal place of business located in Los Angeles, California, where it is engaged in the production and distribution of television commercials. In the course and conduct of its business operations, Respondent annually sells and ships goods or services valued in excess of \$50,000 directly to customers located outside the State of California. Respondent, in the course and conduct of its business operations, derives gross revenues in excess of \$500,000 yearly.

Upon this record the parties have stipulated that Respondent is now, and has been at all times material herein, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities affecting commerce within the meaning of Section 2(6) and (7) of the statute. Consistent with their factual stipulations, hereinabove noted, I so find.

II. THE LABOR ORGANIZATIONS CONCERNED

Complainant Union, National Association of Broadcast Employees and Technicians, AFL-CIO, CLC, Local 531, sometimes designated NABET herein, is now, and has been at all times material herein, a labor organization

within the meaning of Section 2(5) of the Act. Likewise, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, herein called IATSE, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the statute. Both labor organizations admit certain of Respondent's employees to membership.

III. THE UNFAIR LABOR PRACTICES CHARGED

A. Issue

Within his brief Complainant Union's counsel correctly defines the single, basic question which must be resolved herein. That question is: Did Respondent violate Section 8(a)(1), (2), and (3) of the Act by granting recognition to and entering into a collective-bargaining agreement with IATSE, which agreement contained a union-security clause requiring membership in IATSE, notwithstanding the existence of a real question concerning representation among the employees in the unit covered by said agreement and while Respondent knew that NABET was actively seeking to represent said employees? With respect thereto, the General Counsel contends, of course, that affirmative responses would be warranted. Respondent argues, however, that its recognition of IATSE's representative status, followed by its written agreement to be bound by a multiemployer collective-bargaining contract then in force between IATSE and more than 400 firms in the motion picture, television, and television commercial industry, should not be considered violative of statutory mandates. In this connection Respondent contends, basically, that no "real question concerning representation" had been effectively raised with respect to its employees prior to its memorialized consent to be bound by IATSE's contract. Alternatively, Respondent suggests that, while NABET might arguably have pressed its claim with respect to Respondent's purported prior recognition of its representative status through appropriate procedures before the firm consented to coverage under IATSE's multiemployer contract, Complainant Union's failure to press that claim in a timely fashion constituted a relinquishment of its right to challenge the propriety of Respondent's contractual commitment.

B. Facts

1. Complainant Union's purported recognition demand

On or about April 11, 1979, Louis Favara, NABET's business manager, by telephone, invited Chuck Sloan, Respondent's president, to lunch. A luncheon meeting was held on or about May 2, 1979. With respect to their luncheon conversation, the parties have stipulated Favara would testify that Sloan was told all of Respondent's employees were NABET members and that he asked Sloan to recognize NABET and sign a contract with his organization covering Respondent's employees. Sloan, however, would testify, so the parties have stipulated, that there was no discussion about employee union

preferences or membership, and that Favara did not then request recognition. For present purposes, however, whatever conflict their respective testimonial recollections, if proffered herein, might have revealed need not be resolved. All parties agree that on this occasion Favara did not offer to prove Complainant Union's majority representative status through a check of authorization cards or otherwise.

Within a letter directed to Respondent's president dated July 19, 1979, and delivered to Respondent's place of business by certified mail the following day, Favara recapitulated purported developments *subsequent* to their May 2 luncheon meeting. He mentioned a purported *post-May 2* discussion with respect to Respondent's answer regarding his organization's purported demand for recognition, commented that President Sloan's reaction had then been "favorable" so far as recognition was concerned, and reported his recollection that Respondent's president had informed him they would "get together" some time later to "finalize" their negotiations. Stating that his efforts to contact Sloan following their discussion had been unavailing, Favara declared that, unless he heard from Respondent's president within 7 days, he would be "obliged" to file a representation petition with the Board. No stipulations have been proffered for the present record regarding Favara's purported *post-May 2* discussion with Sloan described within the business manager's letter. Complainant Union's business manager may have *intended* a recapitulation of their May 2 luncheon discussion merely. For present purposes, however, the letter's proffered summary with respect to their purported discussion, regardless of when it took place, must be considered documentary hearsay merely. The stipulated record herein reflects no written or verbal reply specifically calculated to confirm or contradict Favara's July 19 narrative recitals vouchsafed by Respondent's president. The General Counsel, Respondent, and IATSE have, however, stipulated that:

At no time did Respondent recognize or agree to recognize NABET as exclusive bargaining representative of Respondent's employees.

Complainant Union does not currently "agree" with these three parties regarding the stipulation noted. For present purposes, however, the General Counsel's concurrence with particular reference to that stipulation must be considered "binding" upon Complainant Union herein. *Borg-Warner Corp.*, 113 NLRB 152, 154 (1955). When this case was heard, NABET's representative had the right to introduce testimonial or documentary evidence calculated to contradict the stipulation; Complainant Union's sole proffer in this connection, however, rests upon the purported narrative statements, clearly self-serving in character, found within Favara's July 19 letter noted above. Those statements, herein characterized as hearsay, provide no reliable, substantial, or probative support, within my view, for factual determinations contrary to the particular stipulation hereinabove noted, with regard to which Complainant Union refuses to join.

On or about July 25, 1979, during a telephone conversation between Sloan and Favara, Respondent's president

indicated that he would attend, as an observer, a negotiation session or sessions between NABET and the Association of Independent Commercial Producers, designated as AICP herein. Representatives of Complainant Union and the multiemployer group designated were, so the stipulated record shows, then engaged in negotiations for a collective-bargaining agreement.

On or about August 3, 1979, Sloan telephoned Favara and asked for a letter stating that Respondent is a union company. When Favara asked why, Sloan responded that a client of Respondent had demanded that a job, to be done by Respondent, be done by union people under a union contract. Favara agreed to send Sloan a letter saying that NABET and Respondent were negotiating a contract. The business manager's letter, dated August 3, read as follows:

This letter will confirm or acknowledge to any interested person or companies that your Company and our Union are currently engaged in good-faith bargaining for a labor agreement covering the film production employees of your Company.

Thereafter, on or about August 6, Respondent's president, so the stipulated record shows, attended the fourth contract negotiating session between NABET and AICP representatives. The General Counsel, Respondent, and IATSE have stipulated herein that Sloan attended that negotiation meeting as an observer merely. Consistent with their tripartite stipulation, I so find.

Complainant Union, so the stipulations of record herein show, has not "agreed" that Sloan had previously indicated he would attend the NABET-AICP negotiations *solely in the capacity of an observer*, or that his role during the August 6 session noted had really been confined to observation. Within a subsequent letter dated September 26 and directed to Respondent's president, which will be summarized further hereinafter, Favara detailed his purported recollection contrariwise that Sloan had, in fact, attended the NABET-AICP negotiating session "as a member of the Negotiating Committee" representing the producers, and that he had there "involved" himself in the bargaining process. As previously noted, however, Favara's factual recitals set forth within his communications directed to Respondent's president clearly constitute hearsay. Absent some documentary or testimonial "indication" reflective of Sloan's concurrence, or some acknowledgement that Favara's recitals might be considered correct, those recitals carry no probative thrust sufficient to warrant rejection of the General Counsel's stipulation noted above that Sloan's role while attending the negotiations in question had been confined to observation merely.

On or about September 19, 1979, Favara telephoned Sloan and asked if he would sign the new contract which NABET and AICP's individual member companies had entered into on August 28, 1979. Sloan replied that he had reservations about the terms of the contract, and that he would have to meet with his partners about it.

2. Respondent's refusal to negotiate with Complainant Union

On or about September 25, 1979, Favara again telephoned Sloan; Respondent's president said that he could not discuss signing a contract. Sloan advised Favara that he had received a letter from IATSE claiming majority status and demanding recognition. Further, he notified Favara that Respondent was considering recognizing IATSE, if IATSE was able to verify its majority status. Complainant Union's business manager did not offer to prove his organization's majority representative status.

However, within a letter dated September 26 and dispatched to Respondent's president by certified mail, Favara claimed that, during their May 2 luncheon discussion, Sloan had "conceded" Complainant Union's majority representative status; that Respondent's president had declared he would "bargain in good faith for an agreement" between NABET and his firm; that Sloan had promised to "get together" with him thereafter to "finalize" negotiations; that he, Favara, had, within his previous July 19 letter, demanded NABET's recognition as exclusive bargaining representative for Respondent's employees; and that, when queried on or about July 25 with respect to whether he wished to negotiate a collective-bargaining contract on their "one-to-one" basis or would prefer to join the 14-member "industry Group" with which NABET was currently negotiating, Sloan had declared his preference for contract negotiations which involved the designated industry group's bargaining committee. Further, Favara claimed that his August 3 letter confirming Respondent's current engagement in "good-faith bargaining for a labor agreement" with NABET had been sent at Sloan's request; that Respondent's president had attended Complainant Union's August 6 contract negotiations "as a member of the Negotiating Committee" representing the producers; and that Sloan had then involved himself in the "give and take" of the bargaining process sufficiently to persuade NABET's representatives that Respondent was "committed" to negotiate a contract.

Complainant Union's business manager finally reported that, during NABET's August 28 bargaining session with the management negotiating committee noted, contractual agreements had been reached which various employers had subsequently executed. Citing his prior September 19 telephone call soliciting Respondent's signed adherence to NABET's newly negotiated contract and Sloan's purported responsive, comment that he had "various reservations" concerning that contract's terms—which Respondent's president had followed with his September 25 declaration that Respondent had meanwhile received a demand for recognition from IATSE with respect to which the firm's counsel had suggested he, Sloan, should make no further statements—Favara declared Complainant Union's position as follows:

Accordingly, our position is that you properly recognized NABET as the sole and exclusive bargaining representative; that you negotiated with our Union and that you are obligated to execute the Standard Basic Agreement or to continue to bargain in good faith. If you don't or if you refuse, our

Union shall file appropriate charges of Unfair Labor Practices, including refusing to bargain.

Within a reply letter dated and presumably dispatched on September 28, which Favara received 3 days later, counsel for Respondent stated his client's position with regard to NABET's September 26 claims. Complainant Union's business manager was notified that Respondent had never within the past 6 months employed a regular complement of film production employees within a unit appropriate for collective-bargaining purposes; that NABET had never within the 6-month period noted claimed to represent a majority of Respondent's employees within such a bargaining unit; that Complainant Union had never within the 6-month period noted proffered evidence calculated to support a claim that some majority of Respondent's employees within a unit appropriate for collective-bargaining purposes had designated it as their bargaining representative; that Respondent had never within the past 6 months recognized NABET as the exclusive bargaining representative of any of its employees within a proper bargaining unit; that within the period designated Respondent could not have "lawfully" recognized NABET or any other labor organization as the exclusive collective-bargaining representative of its employees within a unit appropriate for collective-bargaining purposes; and that Respondent had never within the 6-month period noted participated in negotiations with NABET or any other labor organization either alone, jointly with other employers, or as part of some multiemployer group. Respondent's counsel reported finally that his client had received a claim of majority status, coupled with a recognition demand, from another labor organization *apparently* based on the fact that a number of "employees" whom Respondent had "hired" and given "prospective start dates" for a new production were "represented" by that organization.

Save for their September 26 and 28 letters herein noted, neither Favara nor any other NABET representative has had any communication of any sort with Respondent's representative since the September 25 telephone conversation between Favara and Sloan previously summarized herein.

3. Respondent's adherence to IATSE's contract

At all times material herein more than 400 employers engaged in the motion picture, television, and television commercial industry have negotiated, executed, and administered multiemployer collective-bargaining agreements with IATSE as part of a single multiemployer bargaining unit.

IATSE and the group of employers described above had entered into a collective-bargaining agreement, herein called the Basic Agreement, effective February 1, 1976. Thereafter during 1979 they had negotiated a new Basic Agreement for a 3-year term commencing August 1, 1979, and extending to and including July 31, 1982. The agreement, currently in force, covers rates of pay, wages, hours of employment, and other terms and conditions of employment for employees within the following unit:

Included: All employees in the crafts and classifications described in Articles III and IV of the Basic Agreement employed by the employers described in Article V of the Basic Agreement.

Excluded: All other employees, office clerical employees, guards and supervisors as defined in the Act.

The agreement in question further contains a union-security provision. In pertinent part that provision reads as follows:

Producers severally agree that each and every employee hired by the Producer to perform services in the County of Los Angeles, or hired by the Producer in the County of Los Angeles to provide services outside said County, in the crafts and classifications of work described in Articles III and IV hereof, shall be and remain a member in good standing of the International Alliance and the appropriate West Coast Studio Locals on and after the thirtieth day following the beginning of his first employment.

On October 12, 1979, as the result of a demand for recognition and check of authorization cards, Respondent granted IATSE recognition as the exclusive collective-bargaining representative of Respondent's employees employed in the crafts and classifications which the current Basic Agreement covers. Respondent agreed and consented further to be part of the multiemployer bargaining unit covered by that Basic Agreement. On the date noted, Respondent likewise agreed to become a party to, and to be bound by, the Basic Agreement cited.

4. Subsequent developments

On November 1, 1979, NABET filed a representation petition with the Board docketed as Case 31-RC-4640; therein NABET sought an election within the bargaining unit covered by the contract between Respondent and IATSE previously referred to herein. A hearing premised upon NABET's petition, with respect to which I take official notice, was convened on November 16; therein, IATSE's intervention, bottomed upon its claimed contractual relationship with Respondent herein, was permitted. Thereupon, Respondent contended that its memorialized October 12 consent to be bound by IATSE's Basic Agreement, currently in force, should be considered a valid "contract bar" sufficient to mandate dismissal of NABET's representation petition.

Counsel for that designated organization, however, suggested that IATSE's contract should not be considered a bar. He contended: *First*, that IATSE had not satisfied a condition precedent with respect to contract-bar claims since it had not shown that it represented a majority of Respondent's employees, properly cognizable as compassed within a defined unit appropriate for collective-bargaining purposes, when Respondent consented to be bound thereby; *second*, that IATSE's claimed majority representative status, particularly on October 12, had really been premised upon nothing more than purported designations procured from Respondent's employees hired for a single project then in progress; and *third*, that

Respondent had failed to demonstrate persuasively that, when it consented to be bound by IATSE's contract, the firm's management representatives were "unaware" with respect to NABET's currently active organizational effort within Respondent's concerned employee complement. With matters in this posture, so NABET's counsel argued, the legitimacy of Respondent's claimed contractual commitment should be litigated and determined within the proceedings then in progress with respect to his client's representation petition; counsel contended that, should Respondent's contractual commitment then be deemed illegal, that commitment could not properly be considered sufficient to preclude a representation vote.

When notified, however, that this Board's Regional Director would not "allow" NABET's presentation of evidence, within the representation proceeding, calculated to support its contentions hereinabove noted, and would not determine the legitimacy of Respondent's proclaimed contractual commitment, specifically within that proceeding, Complainant Union's counsel promptly filed the charge herein previously noted.

With matters in this posture further proceedings with respect to NABET's representation petition were thereupon postponed "indefinitely" pending some disposition of Complainant Union's charge and the General Counsel's complaint herein premised thereon.

C. Discussion and Conclusions

The General Counsel's Contentions

The General Counsel contends herein that Respondent committed 8(a)(1), (2), and (3) unfair labor practices when it recognized IATSE's majority representative status, bargained with that labor organization, and finally negotiated contractual privity with it consistent with its current multiemployer collective-bargaining contract which contained a union-security clause. Specifically, Respondent should be considered to have flouted the statute, so the General Counsel claims, because it pursued this course of conduct despite its knowledge that Complainant Union currently "had an interest" with respect to representing Respondent's employees within the particular bargaining unit crafts and classifications which IATSE's Basic Agreement covered.

In pressing his contention, the General Counsel's representative primarily relies upon this Board's *Midwest Piping* doctrine, which, since its promulgation, has been consistently followed with judicial concurrence vouchsafed within a variety of factual contexts. *Midwest Piping Co.*, 63 NLRB 1060 (1945). Pursuant to that decisional doctrine: An employer faced with conflicting claims of two or more rival unions which give rise to a real question concerning representation may not recognize or enter into a contract with one of those unions until its right to be recognized has finally been determined under the special procedures provided by the Act. This Board has, however, held consistently that *Midwest Piping's* decisional principle cannot properly be relied upon to challenge a concerned employer's contractual recognition of some labor organization's majority representative

status when a putatively conflicting representational "interest" claimed by that labor organization's rival has been found clearly unsupportable, specious, or lacking in substance. *Playskool, Inc.*, 195 NLRB 560 (1972), enf. denied 477 F.2d 66 (7th Cir. 1973); cf. *American Bread Co.*, 170 NLRB 85, 87 (1968); *Boys Markets*, 156 NLRB 105, 107 (1965). Since the concerned employer's statutorily grounded obligation to maintain a position of strict neutrality when confronted with conflicting claims by two or more rival unions will be considered generated only when that employer has been confronted with some "real question" concerning representation, the General Counsel's representative must preliminarily demonstrate, so these Board decisions hold, that the particular representation claim which such a concerned employer chose to disregard was, at the very least, worthy of being considered a colorable claim.

Mindful of these considerations, the General Counsel's representative, basing his contention upon the stipulated record, claims herein that Complainant Union's business manager had initially notified Respondent's president with regard to his organization's claimed representational interest within his *July 19* letter previously summarized herein. Within that letter, however, NABET's business manager, significantly, had proffered no claim in haec verba that his organization then represented a majority of Respondent's workmen currently or previously employed within a defined unit considered appropriate for collective-bargaining purposes. Further, Favara had not therein mentioned any *prior May 2 claim* that all Respondent's employees were then NABET members. He had merely referred to Complainant Union's supposed demand for recognition, which he claimed to have presented previously; cited President Sloan's purportedly "favorable" reaction with respect thereto; and recapitulated Sloan's purported commitment to meet with him later when they would "finalize" their negotiations. Concededly, business manager Favara had not *offered* to prove Complainant Union's majority representative status, through a check of authorization cards or otherwise, during his prior May 2 luncheon meeting with Respondent's president previously noted herein. Further, nothing within the stipulated record would warrant a determination that Favara had, between his May 2 luncheon meeting with Sloan and his July 19 letter to Respondent's president, reported his current readiness to support Complainant Union's recognition demand with "proof" calculated to demonstrate that organization's majority representative status. Upon this record, Favara's July 19 letter clearly constituted nothing more than a current demand for NABET's recognition, presumably bottomed upon some claim, sub silentio, with respect to that organization's majority representative status which its business manager had not, however, previously offered to prove, and which had not theretofore been demonstrated. Thus, while the letter in question might arguably be considered effective *notice* vouchsafed to Respondent with respect to NABET's representational interest claim, that claim, standing alone, could hardly be deemed "colorable" herein.

Complainant Union's business manager did declare within his letter that President Sloan had reacted "favor-

ably" when confronted with his purported May 2 demand for recognition, and that future negotiations, looking toward some "finalized" contract, had then been promised. The correctness of Favara's parallel July 19 claims, however, has nowhere herein been conceded; previously within this decision the General Counsel's contradictory stipulation that Respondent has never specifically "recognize[d] or agree[d] to recognize" Complainant Union as the exclusive representative of Respondent's employees has, rather, been considered conclusive.

For present purposes, therefore, business manager Favara's July 19 letter, though it purported to put Respondent on notice that Complainant Union considered President Sloan *committed* to grant it recognition and bargain for a contract, may properly be considered, as previously noted, nothing more than a simple notification directed to Respondent's president with regard to NABET's claimed "interest and desire to represent" certain of Respondent's employees.

Within his brief, indeed, Complainant Union's counsel suggests nothing further; he contends merely that for 6 months NABET was "actively attempting" to have Respondent recognize its claims with respect to bargaining representative status.

In short, Respondent was confronted within Favara's letter with a mere "naked" claim, *proffered without supportive proof*, that Respondent had theretofore granted it recognition with some consequent contract negotiations promised. That simple claim, standing alone, has clearly generated no bargaining "duty" binding upon Respondent with respect to which Complainant Union could possibly have sought Board validation consistent with Section 9(c) and Section 8(a)(5) of the statute. Nor, standing alone, without some acknowledgement concerning its factual support or justification vouchsafed in Respondent's behalf, could such a bare claim have generated a cognizable question concerning representation with respect to which Complainant Union could have properly sought a Board-sponsored vote.

The General Counsel's representative suggests, however, that several "repeated contracts" between the parties, *subsequent to Favara's July 19 letter*, sufficed to raise a cognizable question with regard to NABET's representative status since those contacts, minimally, revealed Respondent's manifest "knowledge" that Complainant Union's claim was *not* clearly unsupportable and lacking in substance.

The stipulated record herein, within my view, preponderantly supports the General Counsel's presumptive position; it reveals in this connection that:

(1) Within the week which followed his receipt of Favara's July 19 letter, Respondent's president did "indicate" that he would attend a bargaining session or sessions concerning NABET's contract negotiations with a group of television commercial producers, which, however, he would "observe" merely.

(2) On or about August 3 President Sloan, for stated business reasons, did request Complainant Union's business manager to provide him with a letter stating that Respondent was a so-called union firm. Pursuant to this

request, Favara promptly dispatched a letter to Respondent's president which "confirmed or acknowledged" that Respondent and NABET were currently engaged in good-faith bargaining for a labor agreement.

(3) Some 3 days later President Sloan did, consistent with his previously declared intent, attend a contract negotiating session between NABET and Association of Independent Commercial Producers representatives; he did not, however, participate in those negotiations, but merely "observed" them.

(4) When Favara subsequently telephoned Sloan on or about September 19 with a query as to whether he would sign the new NABET-Association contract which had theretofore been negotiated, Respondent's president did not question Complainant Union's majority representative status, but, rather, professed "reservations" with regard to that contract's terms, declaring that he would have to "meet with his partners" regarding the situation.

With matters in this posture, so the record shows, Complainant Union's business manager, shortly thereafter, did claim within his September 26 letter previously noted herein that Respondent had "properly recognized" his organization's sole and exclusive bargaining representative status, that Respondent had previously "negotiated" with his organization, and that Respondent therefore was currently "obligated" to sign NABET's newly negotiated multiemployer contract or continue good-faith bargaining.

The General Counsel's representative, however, has proffered no such broadly gauged contention. He argues merely that when Respondent subsequently recognized IATSE, bargained with that organization, and consented to be bound by its Basic Agreement currently in force, the firm did so with full knowledge, *manifested through its July-September course of conduct hereinabove noted*, that Complainant Union had a cognizable "interest" with respect to representing the crafts and classifications covered by IATSE's contract. So construed, the General Counsel's position, within my view, merits Board concurrence.

Upon this record there can be no doubt that, contrary to business manager Favara's declared "position" set forth within his September 26 letter, no definite recognition of Complainant Union's majority representative status, *formal or de facto*, can be inferred from President Sloan's course of conduct following his receipt of Favara's July 19 letter. That course of conduct, however, will clearly warrant a determination, consistent with the General Counsel's contention previously noted, that, before October 12, when Respondent purportedly confirmed the correctness of IATSE's majority representative claim and memorialized their prospective contractual relationship, President Sloan had manifested his *awareness* that NABET was "seeking to represent" his firm's employees within the crafts and classifications which IATSE's Basic Agreement would cover.

Nevertheless, the General Counsel's proffered predicate for his basic contention, that this case's disposition should be considered governed by *Midwest Piping's* decisional rationale, requires further consideration. Can it be said upon this rather spare, stipulated record that Presi-

dent Sloan's patent *knowledge* with respect to Complainant Union's representational interest claim sufficed to put Respondent on notice that a genuinely cognizable "question of representation" had been raised thereby which should have given the firm pause when IATSE's conflicting claim was presented? This Board's response with respect to that question, which may be discerned within several persuasively relevant decisions, would seem to be clear.

Initially, Complainant Union's representational interest claim, proffered within Favara's July 19 letter, clearly rested upon nothing more than the business manager's reiterated declarations with respect thereto; no signed designation cards or comparable proofs of employee interest, purportedly supportive of NABET's claim, had ever been reported, much less submitted, for Respondent's consideration. This Board has, of course, disclaimed any decisional requirement that some "numerical percentage" showing of interest manifested by bargaining unit employees with respect to their union preference will be considered a condition precedent when determinations must be made regarding the existence of some cognizable question concerning their representation. *Playskool*, supra. Clearly, however, some persuasive showing beyond a labor organization's mere "naked" claim must be made. *Dillon's Companies*, 237 NLRB 759, 761-762 (1978), and cases therein discussed. Upon this record, which reveals NABET's failure to provide some objective "support for Favara's reiterated demands for recognition, Complainant Union's bare claims, per se, cannot be considered sufficient to put Respondent on notice that a cognizable question concerning representation existed.

The General Counsel's representative, however, suggests essentially that various "repeated contacts," previously noted herein, between Complainant Union's business manager and President Sloan did more than reveal Respondent's *knowledge* with respect to Favara's representational claim; they made manifest, further, Respondent's presumptive *willingness to concede* that NABET's claim was really substantively justified. This Board, within my view, may properly consider the General Counsel's suggestion worthy of concurrence.

In this connection, the stipulated record, previously noted, first reveals President Sloan's July 25 conceded "indication" that he would attend a forthcoming NABET-AICP contract bargaining session or sessions. Though the record will support a determination that Sloan said he would merely "observe" these contract negotiations, his declaration that he would attend them, whether solicited or volunteered, clearly reflected a *tacit concession*, at the very least, that NABET's majority representative status might be demonstrable. Sloan's demonstrated interest regarding the general course of NABET's contract negotiations then in progress made sense, but only because it necessarily conveyed a message, *sub silentio*, that he considered Complainant Union's previously proffered representation claim somehow supportable. If Respondent's president had not subjectively reached that conclusion, he would hardly have deemed personal "observations" with regard to NABET's contract talks

warranted, necessary, or calculated to serve Respondent's purpose.

Further, President Sloan's August 3 letter solicitation necessarily conveyed a similar message. Respondent can hardly contend now that Complainant Union was thereby being requested to provide a patently false representation regarding their contractual relationship calculated to *mislead* some third party. Within my view, Sloan's request, considered within its situational context, would warrant a determination, rather, that Complainant Union's statutorily grounded right to negotiate a collectively bargained contract with Respondent was essentially being conceded. When, consistent with President Sloan's solicitation, Favara promptly provided him with a letter which reported that Complainant Union and Respondent were "currently engaged in good-faith bargaining for a labor agreement," that document was presumably considered acceptable; nothing within the stipulated record would suggest, contrariwise, that it was rejected. By his request, Respondent's president, so I find, had essentially conceded the substantiality of Complainant Union's representation claim, though his conduct might not herein merit characterization as signifying *formal* recognition with respect thereto.

And, when within 3 days thereafter Sloan did "attend" Complainant Union's fourth contract negotiating session with various AICP representatives, his presence, though limited to passive "observation" solely, necessarily confirmed the sub silentio message which his previous promise and letter request had conveyed.

With matters in this posture Complainant Union's business manager, within my view, could reasonably conclude, as he clearly did, that Respondent's president had, *through his conduct*, given suggestive "indications" that NABET's prior demand for recognition had been granted or that some collectively bargained contract would be obtainable without a confirmatory representation vote.

It should be noted in this connection that business manager Favara had within his July 19 letter notified Respondent that, absent some responsive communication received within 7 days, NABET would file a representation petition. Sloan's declaration that he would attend a forthcoming NABET-AICP contract negotiating session or sessions had been vouchsafed within Favara's declared time limit. No representation petition had thereafter been filed.

When confronted with comparable situations, particularly in representation cases, this Board currently holds that "where a nonincumbent union has refrained from filing a petition to establish its representative status in reliance upon the employer's conduct indicating that recognition had been granted or that a contract would be obtained without an election" that nonincumbent union's representation claim will be considered substantial. See *Deluxe Metal Furniture Co.*, 121 NLRB 995, 998-999 (1958); compare *Chicago Bridge & Iron Co.*, 88 NLRB 402, 404-405 (1950). And, if under such circumstances the particular employer concerned nevertheless executes a contract with another union, that contract will not bar an election should the labor organization which had theretofore been "lulled into inaction" subsequently file a representation petition within some appropriate time.

Herein, so the stipulated record shows, Complainant Union's business manager had, comparably, been given *reason to believe* that his organization's representational claim would not be contested, and that negotiations confirmatory of Respondent's prospective adherence to NABET's newly negotiated master contract with various Association members would shortly be concluded. Consistent with that belief Favara was clearly entitled to pursue Complainant Union's demand for some contractual consensus with Respondent without resorting to Board processes. The record warrants a determination, which I make, that he did so. Respondent has conceded, for present purposes, that during their September 19 telephone conversation Favara specifically requested Respondent's president to sign Complainant Union's newly negotiated contract. And Respondent's president certainly did not then question Complainant Union's previously claimed majority representative status; the record reveals that he merely declared his "reservations" regarding the proffered contract's *substantive* terms which he proposed to discuss with his partners. Under these circumstances, I find, Respondent could not properly disregard Complainant Union's representational claim when confronted subsequently with IATSE's letter claiming majority status and demanding recognition. President Sloan's course of conduct theretofore may not have constituted *formal recognition* with regard to NABET's majority representative status. Clearly, however, Respondent had *thereby* effectively conceded that Complainant Union's previously proffered claim could not be considered clearly unsupportable or lacking in substance.

Between September 25 and October 12, when Respondent granted IATSE recognition and consented to be bound by that organization's Basic Agreement currently in force, a genuine question concerning representation, so I find, confronted the firm. And, consistent with this Board's proclaimed *Midwest Piping* doctrine, Respondent's recognition of IATSE's majority representative status, though purportedly based upon some "check of authorization cards" which that organization had proffered, must be considered illegal assistance which Section 8(a)(2) and (1) of the Act proscribes.

Alternatively, Respondent's October 12 recognition of IATSE's claim, coupled with its consent to become "part of the multiemployer bargaining unit" which that organization's Basic Agreement covered and to become privy thereto, may properly be considered violative of the statute, I find, without regard for *Midwest Piping's* decisional rationale.

This Board has held that, when a concerned employer recognizes and bargains with one of two competing labor organizations without giving notice to one that it intends to determine the representation question by affording the other a card check to determine majority support, such conduct accords the recognized organization preferential treatment and material assistance which Section 8(a)(2) and (1) of the statute proscribes. *Lyndale Mfg. Corp.*, 238 NLRB 1281 (1978); See *Wintex Knitting Mill*, 223 NLRB 1293 (1976) (Member Walther, concurring); *Buck Knives*, 223 NLRB 983, 986-987 (1976) (Member Walther, concurring), *enf. denied* 549 F.2d

1319, 1320 (9th Cir. 1977); compare *Intalco Aluminum Corp. v. NLRB*, 417 F.2d 36, 40 (9th Cir. 1969), which the court of appeals, within its *Buck Knives* decision denying enforcement, distinguishes. Upon this record, comparably, Board determinations would be warranted, within my view, that President Sloan's course of conduct constituted bad-faith dealing on Respondent's part with Complainant Union herein. Respondent's concerned employees, particularly those who would have been considered compassed within a craft or classification unit consensually deemed appropriate for collective-bargaining purposes when NABET's business manager requested his organization's recognition and was "led to believe" that such recognition would be granted, were resultantly deprived of statutorily guaranteed rights.

Within their brief Respondent's counsel contend, however, that *Lyndale's* decisional rationale should not be considered dispositive herein. They would, rather, have this Board note that:

NABET was advised on September 25, 1979 that I.A.T.S.E. had made a demand for recognition, and that Respondent was contemplating granting such recognition if I.A.T.S.E. verified its claim of majority status. *At this point, if it had been truly sincere in its contention, NABET could have filed an election petition or it could have requested an equal opportunity for a card check. NABET did not take either course.* Instead, NABET was satisfied to rely upon its incorrect position that Respondent had already granted voluntary recognition to it.

Thus, these unfair labor practice proceedings are simply an unnecessary product of NABET's deliberate inactivity in the face of the notice afforded it by Respondent. Had NABET filed an election petition between September 25 and October 12—an option of which it certainly was aware . . . [no contract-bar problem would have arisen] . . . and the representation questions would have been resolved years ago. *And had NABET offered to demonstrate majority status Respondent would have unquestionably viewed NABET's evidence. If this evidence had been significant, Respondent would never have granted voluntary recognition to I.A.T.S.E. and NLRB representation proceedings expeditiously could have taken their course without the possibility of a contract bar issue.*

The question thus boils down to whether, in light of NABET's deliberate inactivity, Respondent was obligated to refrain from recognizing I.A.T.S.E. and to demand an NLRB election, even though I.A.T.S.E. had established its majority status to Respondent's satisfaction. There is logically no reason why this should be the case. Therefore, because NABET's inaction between September 25 and October 12, 1979 either demonstrated that, in fact, there was no "real question concerning representation" or constituted a waiver of the right to rely upon *Midwest Piping*, Respondent's recognition of the I.A.T.S.E. was not improper. [Emphasis supplied.]

Nevertheless, for several reasons, discussed hereinafter, Respondent's statement of position, within my view, should not upon this record reasonably command Board concurrence.

Herein, just as this Board's *Lyndale* decision notes, Respondent's course of conduct subsequent to July 19 and prior to September 25 had effectively "lulled [NABET] into inaction" with respect to seeking a conceivable Board-sponsored representation vote. Within its situational context, therefore, Complainant Union's failure to file a representation petition between September 25 and October 12 cannot reasonably be deemed a concession that no "real question concerning representation" required current resolution, or that Respondent's determination to recognize IATSE's majority representative status should be deemed dispositive. Whatever "inaction" Complainant Union might be charged with subsequent to Favara's conceded July 19 demand and prior to Respondent's October 12 recognition of IATSE would logically seem to have been a consequence of President Sloan's misleading course of conduct, which had clearly been reasonably calculated to persuade NABET's business manager that his organization's formal recognition, and subsequent realization of contractual privity with Respondent, would follow shortly. Under such circumstances, Respondent cannot legitimately rely now on Complainant Union's failure to press for a representation vote or bipartite card check to justify its subsequent recognition of that organization's purported rival.

It should be noted in this connection that, with reference to film industry work and particularly television commercial production, this Board has heretofore found that:

. . . crews are hired for a particular production, sometimes only for a day's work, and then laid off without any promise of reemployment. When work is again available, the employer recalls those who had proved satisfactory in the past. [Meanwhile these individuals often work for other employers within the industry.]

Necessarily, therefore, bargaining units within the trade, compassing workers in designated job classifications, have been defined within Board decisions broadly enough to guarantee self-determination with respect to union representation not merely for workers *currently* employed, but, likewise, for laid-off workers *previously* hired "who have a reasonable expectancy of further employment" with their former employer. See *American Zoetrope Productions*, 207 NLRB 621, 622-623 (1973); *Medion, Inc.*, 200 NLRB 1013, 1014 (1972). To accomplish this, particularly when devising "eligibility formulas" required with respect to prospective representation votes, this Board has most recently recognized the requisite "bargaining unit" status shared by workers:

. . . employed . . . on at least two productions [during a 1-year period preceding the issuance of the Board's Decision in the case] and who were not terminated for cause or quit voluntarily prior to the

completion of the last job for which they were employed.

See *American Zoetrope Productions*, supra; cf. *Medion, Inc.*, supra, in this connection. This formula, when relied upon to define the *particular constituency* whose desires with respect to union representation must be determined either through a Board-sponsored election or within some properly maintained complaint proceeding, could, and would be likely to, produce, *at different times*, cognizable groups of concerned workers differing significantly with respect to size and the particular personnel compassed therein.

Thus, when President Sloan notified Complainant Union's business manager during their September 25 telephone conversation that Respondent then was "considering" recognizing NABET's rival, his declaration may conceivably have found Complainant Union burdened with a possibly "stale" representative showing bottomed solely upon designation cards which had theretofore been signed by Respondent's employees, *newly hired*, for some commercial's production 3 or 4 months previously or by *former workers terminated prior thereto* with some presumably reasonable expectancy of rehire. And, since President Sloan's conduct had effectively persuaded Complainant Union's business manager, between July 19 and September 25 particularly, that no promptly filed representation petition bottomed upon some recent "showing of interest" would be necessary, Respondent cannot now legitimately contend, within my view, that NABET's failure to request a late September or October 1979 election, or card check, justified its demonstrated disregard for Complainant Union's reiterated representational interest claims.

Within his September 28 letter, previously noted herein, Respondent's counsel had notified Complainant Union's business manager that IATSE's pending demand for recognition was "apparently" based upon that organization's representation of certain workers who had recently been "hired by the Film Consortium and given *prospective start dates*" for a new production. Confronted with this presumably authorized report, business manager Favara could have reasonably concluded, so I find, that a late September or October 1979 representation vote or designation card check, wherein Complainant Union would be constrained to rely upon some conceivable "showing" reflective of worker support manifested *3 or 4 months* previously within a definable "bargaining unit" whose constituent employee members might have in the meantime been terminated, would have provided no *effective* remedy for the situation created by Respondent's prior pretextual representations.

With matters in their present posture I would find upon this record that President Sloan's course of conduct, previously noted herein, had effectively misled Complainant Union's business manager with regard to Respondent's intentions; that Complainant Union's consequent failure to file a timely July 1979 representation petition had been "induced" thereby; that Respondent's crew complement then at work, plus former employees who might then be enjoying some reasonable expectancy with respect to rehire, had resultantly been deprived of

statutorily guaranteed rights; and that Respondent, when it *subsequently* granted IATSE preferential treatment and material assistance by granting it recognition and by adopting its contract without regard for NABET's previously acknowledged representational interest, violated Section 8(a)(2) and (1) of the statute.

Since IATSE's Basic Agreement contained a union-security clause, Respondent's current and prospective employees covered thereby have further been subjected to discrimination, statutorily proscribed, calculated to encourage their membership in that designated labor organization. See *Lyndale Mfg. Corp.*, 238 NLRB 1281, 1284 (1978); compare *Hillcrest Nursing Home*, 251 NLRB 59 (1980), in this connection. This Board, within my view, should so find.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, since they occurred in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States; absent correction, they would tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

In view of these findings of fact, and upon the entire record in this case, I make the following conclusions of law.

1. Respondent, the Film Consortium, Inc., is, and at all material times herein has been, an employer within the meaning of Section 2(2) of the Act, engaged in commerce or business activities affecting commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

2. Complainant Union, National Association of Broadcast Employees and Technicians, AFL-CIO, CLC, Local 531, and the Party to the Contract, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act, as amended.

3. By recognizing IATSE on October 12, 1979, as the sole bargaining representative of its employees, by consenting, further, to be part of the multiemployer bargaining unit which IATSE's Basic Agreement then in force covered, by agreeing to become a party to, and to be bound by, that agreement, and by thereafter maintaining in effect, and complying with, the provisions of that agreement, all at a time when a question concerning the representation of its employees existed, Respondent has rendered, and continues to render, unlawful assistance and support to IATSE, and has interfered with, restrained, and coerced, and continues to interfere with, restrain, and coerce, its employees in their exercise of Section 7 rights contrary to Section 8(a)(2) and (1) of the Act, as amended.

4. By consenting to become bound by IATSE's Basic Agreement, previously mentioned, containing a union-se-

curity clause, and by maintaining that Basic Agreement in effect, Respondent has discriminated, and continues to discriminate, in regard to the hire and tenure and terms and conditions of employment of its employees, thereby encouraging membership in a labor organization contrary to Section 8(a)(3), (2), and (1) of the Act, as amended.

5. The several unfair labor practices herein specified are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

THE REMEDY

Since I have found that Respondent did engage, and continues to engage, in certain unfair labor practices which affect commerce, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action, including the posting of appropriate notices, designed to effectuate the policies of the Act, as amended.

It will be recommended that Respondent be ordered to withdraw and withhold recognition from IATSE as the representative of its employees unless and until IATSE shall have demonstrated its majority status pursuant to a Board-conducted election among the employees involved. It will also be recommended that Respondent be ordered to cease giving effect to IATSE's Basic Agreement, by which Respondent consented to be bound on October 12, 1979, or any renewal, modification, or extension thereof.

Normally, whenever some employer's statutorily proscribed conduct has included conduct calculated to coerce employees with respect to dues payments, initiation fee payments, or other payments to an assisted labor organization, reimbursement of such payments will be required. Board and court precedents, however, preclude as punitive the application of such a broad reimbursement remedy where there is no evidence that employees were coerced into signing authorization cards for the unlawfully assisted union. See *Unit Train Coal Sales*, 234 NLRB 1265 (1978), and cases cited in footnotes 1

and 2 therein. In this case, the stipulated record provides no warrant for a determination that IATSE's signed authorization cards, procured from various workers who had allegedly been "hired . . . and given prospective start dates" prior to October 12, 1979, had been procured through coercion. The reimbursement remedy, nevertheless, remains appropriate with regard to those employees, if any, who may have been hired *after* Respondent's October 12, 1979, consent to be bound by IATSE's Basic Agreement and who were required to join IATSE pursuant to the union-security provision therein. It will be recommended, therefore, that Respondent be ordered to reimburse such employees for all initiation fees, dues, or other moneys paid by them, or withheld from their wages, pursuant to the union-security provision in IATSE's Basic Agreement, hereinabove noted, or in any extension, renewal, modification, or supplement thereof or in any superseding agreement.

Nothing contained herein should, however, be construed as requiring Respondent to vary the wages, hours, seniority provisions, or other substantive terms of employment which Respondent may have established in the performance of the above-mentioned Basic Agreement or to prejudice the assertion by its employees of any rights that they may have thereunder.

The 8(a)(3) violation herein found may properly be considered technical and derivative in nature. Respondent has been found in violation of Section 8(a)(3) based solely upon the presence of a facially lawful union-security clause within a collective-bargaining contract with respect to which the firm consented to be bound in violation of Section 8(a)(2). Under these circumstances no broad "in any other manner" cease-and-desist order should be considered warranted. *Unit Train Coal Sales*, supra. Respondent should therefore be required merely to cease and desist from "in any like or related manner" interfering with, restraining, or coercing employees with respect to their exercise of rights statutorily guaranteed.

[Recommended Order omitted from publication.]